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No. 86-337

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

OKLAHOMA TAX COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Association of American Railroads ("AAR") respectfully moves, pursuant to Supreme Court Rule 36.3, for leave to file the accompanying brief as *amicus curiae* in support of the petitioner.[1]

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[1] Petitioner has consented to the filing of the brief. The letter signifying this consent has been filed with the Clerk. Respondents have withheld consent.

The AAR is the trade association for the nation's railroads. Its members employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States. The AAR represents its members before courts, agencies and the U.S. Congress when matters of common concern are at issue.

The decision of the Court of Appeals in this case, unless reversed, will have a serious and adverse effect on the railroad industry as a whole. In its ruling, the Court of Appeals, relying upon a prior panel decision which the court declined to disturb pursuant to a motion for *en banc* consideration, affirmed a District Court dismissal of a tax discrimination suit brought by the Burlington Northern Railroad Company ("BN") against State of Oklahoma tax authorities under the provisions of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), codified at 49 U.S.C. § 11503 (1982). Pursuant to the jurisdictional test fashioned by the Court of Appeals in its prior decision and applied in the instant case, tax discrimination suits under Section 306 based on claims of discriminatory overvaluation of railroad property by state tax authorities, as set forth by BN in its District Court complaint, may not be brought unless, at the pretrial stage, a petitioner makes "a strong showing of a purposeful overvaluation . . . with discriminatory intent (Pet. App. 2a)." Because BN purportedly did not make a sufficiently strong pretrial showing of intentional discrimination in this case, the Court of Appeals found the District Court dismissal of BN's tax discrimination suit proper.

Should the decision of the Court of Appeals not be overruled by this Court, and the requirement that a rail carrier demonstrate "purposeful overvaluation with discriminatory intent" continue to apply in the Tenth Circuit as a jurisdictional bar to relief for discriminatory overvaluation claims under 49 U.S.C. § 11503, a serious and wholly unwarranted impediment to a grant of relief under that remedial federal legislation would be allowed to remain in place. Not only would this result directly and adversely affect the numerous AAR member railroads operating in the Tenth Circuit with regard to discriminatory overvaluation claims,[2] it would also adversely affect AAR member railroads operating in other jurisdictions by increasing the cost of interstate transportation by connecting rail carriers and correspondingly decreasing the ability of such connecting carriers to compete effectively with other modes in the provision of interstate transportation services. Imposition of discriminatory state taxes, by decreasing the revenues available to member carriers for the maintenance, rehabilitation and expansion of interstate transportation facilities, also directly and adversely affects the ability of such carriers to provide adequate transportation service to the public.

The AAR, on behalf of its member roads, has participated extensively in the legislative process resulting in the enactment of Section 306 of the 4-R Act and has also participated as an *amicus curiae* in several court cases pertaining to the proper construction of Section 306. Based upon the inclusive scope of its industry membership and its familiarity with the relevant issues in the instant case, the AAR is particularly well-suited to present to the Court for its consideration the impact of the

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[2] At least eight Class I railroads are engaged in interstate operations within the territory embraced by the Tenth Circuit. In addition to petitioner BN, the Atchison, Topeka & Santa Fe Railroad Company, the Chicago and North Western Transportation Company, the Denver & Rio Grande Western Railroad Company, the Kansas City Southern Railway Company, the Missouri-Kansas-Texas Railroad Company, the Southern Pacific Transportation Company, and the Union Pacific Railroad Company operate in the Tenth Circuit.

case below on the railroad industry and the reasons why the railroad industry strongly supports reversal of the judgment below.

Respectfully submitted,

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December 12, 1986

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS CURIAE

As the trade association for the nation's railroads, the Association of American Railroads ("AAR")[1] has a vital

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[1] The AAR is a voluntary, unincorporated, nonprofit association of railroads operating in the United States, Canada and Mexico. Its member railroads employ approximately ninety-four percent of the workers, operate approximately ninety-two percent of the trackage, and account for approximately ninety-seven percent of the freight revenues of all railroads in the United States. The

interest in the interpretation and application of Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, codified at 49 U.S.C. § 11503 ("Section 306").[2] Section 306 was enacted by Congress to prohibit and provide a federal remedy against discriminatory state taxes levied upon railroads, which widespread and long-standing practice Congress found to seriously weaken the nation's railroads and to "constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." Section 306(1). The AAR, on behalf of the railroad industry, participated in the legislative process that culminated in the passage of Section 306 and has an important and ongoing stake in ensuring that the reforms enacted by Congress in that remedial legislation are not lost to the industry or attenuated through improper judicial construction of Section 306's provisions.

SUMMARY OF ARGUMENT

The construction of Section 306 set forth in the Court of Appeals' decision has operated in the instant case, and will continue to operate within the Tenth Circuit unless overturned by this Court, as a serious impediment to the effectiveness and uniformity of the federal remedy

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Association represents its member railroads before courts, the U.S. Congress, government agencies and administrative tribunals when matters of common concern are at issue.

[2] There are some differences in language between Section 306 as originally enacted [§ 306 of Pub. L. No. 94-210, 90 Stat. 31, 54 (1976)] and as subsequently recodified at 49 U.S.C. § 11503. However, the recodification was not intended to effect any substantive change, and the original language is authoritative. *Richmond, Fredericksburg v. Department of Taxation*, 762 F.2d 375, 377 (4th Cir. 1985); *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 206 n.1 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981). Accordingly, this section will be referred to hereafter as "Section 306," and all citations will be to Section 306 as originally enacted. Pet. App. at 20a.

against discriminatory state taxation provided by Congress in Section 306. In the instant case, the Burlington Northern Railroad Company ("BN") filed a complaint against Oklahoma state tax authorities pursuant to the provisions of Section 306 claiming that its property had been treated discriminatorily for ad valorem tax purposes in relation to other commercial and industrial property in Oklahoma because state tax authorities had overvalued its property in Oklahoma relative to other commercial and industrial property in the state. The District Court dismissed BN's case prior to trial for lack of subject matter jurisdiction based upon a prior decision of the Court of Appeals [in *Burlington Northern Railroad v. Lennen*, 715 F.2d 494 (10th Cir. 1983), *cert. denied*, 467 U.S. 1230 (1984) ("*Lennen*")] holding that, although discriminatory impact is generally sufficient to establish a claim under Section 306, discriminatory *overvaluation* claims are cognizable under Section 306 only where a railroad can make "a strong showing of purposeful overvaluation . . . with discriminatory intent [715 F.2d at 498]." Pet. App. at 10a.

In its decision in the instant case, the Court of Appeals declined to disturb the *Lennen* holding on motion for *en banc* consideration and found that "the district court correctly applied *Lennen* by requiring Burlington Northern to make a strong showing of intentional discrimination through overvaluation to establish jurisdiction." Pet. App. at 2a. The Court of Appeals also "agree[d] with the district court that Burlington Northern failed to establish a strong initial showing of prima facie case of intentional discrimination" (Pet. App. at 3a)," and affirmed the District Court's dismissal of BN's state tax discrimination claim under Section 306.

The "discriminatory intent" jurisdictional requirement applied by the court below is contrary to the language and purpose of Section 306 and provides a ready means by which state tax authorities within the Tenth Circuit

may (through the simple expedient of systematic overvaluation of railroad property for tax purposes) wholly negate or seriously curtail the availability of federal remedies against state tax discrimination provided by Section 306. Moreover, the "discriminatory intent" test applied by the court below is in direct conflict with recent decisions of the Eighth and Ninth Circuits specifically rejecting a "discriminatory intent" requirement for Section 306 overvaluation claims and is also inconsistent with decisions in other Circuits construing the purpose and scope of Section 306 as to preclude in equal fashion all forms of state tax discrimination. In short, if the "discriminatory intent" test applied by the court below is allowed to stand, it will seriously interfere with the operation of Section 306 as Congress intended and will leave railroads operating within the Tenth Circuit without an effective remedy against state tax discrimination. The AAR therefore strongly supports the petition seeking reversal of the judgment below.

ARGUMENT

I. The "Discriminatory Intent" Jurisdictional Requirement Applied By The Court Below Is Contrary To The Language And Purpose Of Section 306 And Provides A Ready Means By Which State Tax Authorities May Negate The Federal Remedies Against State Tax Discrimination Provided By Section 306

A. *Section 306 Of The 4-R Act*

It has long been recognized that state property taxation of railroads has operated, over the course of many years, "in a fashion inherently discriminatory against the railroads." *Clinchfield R. Co. v. Lynch*, 700 F.2d 126, 128 (4th Cir. 1983); S. Rep. No. 91-630, 91st Cong., 1st Sess. 1-8 (1969); H. Rep. No. 94-725, 94th Cong., 1st Sess. 76-78 (1975). It has also long been recognized that the effects of discriminatory state taxation upon the rail-

road industry has been massive and persistent,[3] and that such tax discrimination operated to seriously weaken the national transportation system (as well as unfairly burden shippers and consumers with excessive transportation costs). See, e.g., S. Rep. No. 91-630, at 3-8; H. Rep. No. 94-725, at 78.

In 1976, Congress set out "to eliminate the long-standing burden on interstate commerce resulting from discriminatory state and local taxation" of railroads by enactment of Section 306 of the Railroad Revitalization and Regulatory Reform Act ("4-R Act").[4] Section 306 (1)(a) provides that a state engages in unlawful tax discrimination if it assesses:

> transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

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[3] In a 1969 Senate Report it was found that over the previous nine year period the railroad industry had been assessed more than $900 million in discriminatory state and local property taxes. S. Rep. No. 91-630, at 3; see also H. Rep. No. 94-725 at 78 ("The Committee found that railroads are over-taxed by at least $50 million each year."). Congress also noted that the railroads "are easy prey" for state and local tax assessors because they are "non-voting, often nonresident, targets for local taxation, and cannot easily remove their right-of-way and terminals." S. Rep. No. 91-630, at 3.

[4] The quoted language comes from the statement of purpose of a predecessor bill to Section 306 as set forth in S. Rep. No. 630, 91st Cong., 1st Sess. 1 (1969); see also S. Rep. No. 92-1085, 92d Cong., 2d Sess. 3 (1972). As consistently recognized by the courts, the relevant legislative history of Section 306 is principally set forth in the extensive consideration Congress gave to prior bills containing language similar in essential respects to Section 306. See *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 865 n.6 (9th Cir. 1983), *cert. denied*, 464 U.S. 846 (1983); *Ogilvie v. State Bd. of Equalization*, 657 F.2d at 206, n.1 (8th Cir. 1981).

Section 306 also makes unlawful the imposition of a state ad valorem tax on railroad property at a tax rate higher than that generally applicable to other commercial and industrial property in the same assessment jurisdiction (306(1)(c)) and broadly prohibits the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad . . ." (306(1)(d)). Section 306 further provides that federal district courts may grant injunctive relief to prevent violations of Section 306, notwithstanding the provisions of the Tax Anti-Injunction Act, 28 U.S.C. § 1341.[5]

B. *The* Lennen *Decision Relied Upon By The Court Below*

In affirming the District Court's dismissal of BN's tax discrimination suit because of BN's alleged failure to "establish a strong initial showing of prima facie case of intentional discrimination (Pet. App. at 3a)," the court below relied solely upon its prior decision in *Lennen*, which it found controlling. Pet. App. at 2a. Because the opinion below provides no additional statutory analysis in support of the court's "intentional discrimination" test for overvaluation claims arising under Section 306 (Pet. App. at 2a-3a), resort to the decision in *Lennen* is necessary for analysis of the statutory construction issue raised by the instant case.

In construing the scope of Section 306, the *Lennen* court specifically recognized that Congress intended to equalize both tax rates and assessment ratios between railroad and other commercial and industrial properties in the same assessment jurisdiction. 715 F.2d at 496-97. The court, moreover, specifically recognized that "Section 306 was enacted to prevent both de jure and de facto

[5] 28 U.S.C. § 1341 generally deprives federal district courts of jurisdiction to enjoin state taxation unless there is a showing that a "plain, speedy, and efficient remedy" is not available in the state courts.

discrimination against railroads in the collection of ad valorem taxes" (*Id.* at 497), and specifically identified at least one form of de facto discrimination against railroad property that would fall within the broad provisions of Section 306:

> The most common form of de facto discrimination is imposing the same percentage rate of tax on both classes of property, but applying that rate to a value less than the true market value of other commercial and industrial property while applying it to the full true market value of rail property.

Id. at 497. Thus the *Lennen* court clearly recognized that de facto *undervaluation* of commercial and industrial property is prohibited by Section 306 and that such conduct on its face would provide a basis for federal injunctive relief under Section 306. *Id.*

The *Lennen* court, however, while acknowledging that discriminatory *overvaluation* of railroad property constitutes "another potential form of discrimination, also de facto" (*id.* at 497), declined to allow a Section 306 discriminatory overvaluation claim to be maintained in the case before it based solely upon proof of actual discriminatory impact. The court reasoned that "it is by no means clear that § 306 was intended to provide relief from every form of de facto discrimination" (*id.*) and further found that the legislative history of Section 306 does not indicate that Congress addressed "the problem or benefits of involving the district courts in the intricacies of the process of arriving at the valuation of rail property." *Id.* at 497. The court also found "no express indication . . . that Congress intended the railroads to escape the general noninterference rule of [28 U.S.C.] § 1341 to the extent that they could challenge the manner in which state assessment officials arrived at the fair market value of their property in federal court on a yearly basis." *Id.* at 498. The Court therefore concluded that "[a]bsent a specific directive from Congress, we are

unwilling to infer that it intended district courts to sit as state tax assessment boards for railroad property." *Id.* The *Lennen* court, however, in implicit recognition that Section 306 must be construed to provide at least *some* ostensible form of relief for discriminatory state taxation claims based upon overvaluation, adopted the "discriminatory intent" requirement that is the subject of the instant appeal. *Id.* at 498.[6]

C. *The "Discriminatory Intent" Test Applied By The Court Below Is Contrary To The Language And Purpose Of Section 306*

Nowhere in the language or legislative history of Section 306 is there any indication that Congress intended to qualify or limit the broad antidiscrimination relief granted by that remedial legislation through the imposition of a "discriminatory intent" jurisdictional requirement. The prohibitory language of Section 306 is sweeping in its scope, proscribes discriminatory consequences of state taxation without reference to the intent of state tax officials and is specifically directed (*inter alia*) at "assessment ratio" discrimination between railroad property and other commercial and industrial property (306 (1)(a)). Such assessment ratio discrimination, as the *Lennen* Court implicitly recognized, can occur with equal effectiveness *either* through state *undervaluation* of nonrailroad property with respect to "true market value" or

[6] The *Lennen* court held that section 306 was intended to provide only what the court characterized as "equalization" relief (meaning relief from de jure discrimination, or de facto discrimination accomplished through undervaluation of non-railroad property). 715 F.2d at 497. The court expressly stated that "valuation" relief (i.e., relief from de facto discrimination accomplished through overvaluation of railroad property) did not fall within the scope of section 306. *Id.* Although the court set forth its statutory construction in categorical terms, it nevertheless proceeded to fashion the "intentional discrimination" test at issue as a jurisdictional prerequisite for discriminatory state taxation claims based upon overvaluation. *Id.* at 498.

through state *overvaluation* of railroad property with respect to "true market value." To hold, as the *Lennen* Court did, that Section 306 directly prohibits the results of one type of discrimination, but not the other (absent a "strong showing" of discriminatory intent) creates an unwarranted distinction where none was made by Congress, and simply cannot be squared with the general statutory language used, which applies equally to proscribe the consequences of both forms of discrimination.

Moreover, contrary to the findings of the *Lennen* court, the statutory scheme clearly demonstrates that Congress, through enactment of Section 306, fully contemplated and intended that the federal courts would be required to consider valuation claims pertaining to railroad property where relevant to a Section 306 discrimination claim. Section 306(2)(d) specifically provides, without exception, that "the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable state law." Section 306 (2)(d). Because proof of assessment ratio discrimination necessarily requires a showing of disparate "assessed value/true market value" ratios *between* railroad and nonrailroad property, it is evident that Congress, in enacting the burden of proof requirements of Section 306 (2)(d), fully and necessarily intended that such requirements would govern proof of "assessed value" and "true market value" for *both* railroad and nonrailroad property.[7] Congress thus fully anticipated, and made general provision for, proof of "true market value" of railroad

[7] Moreover, the legislative history makes clear that Congress viewed true market value as an objective, single standard against which assessed values would be compared in determining discrimination claims under Section 306. See, S. Rep. No. 1483, 90th Cong., 2d Sess. 10, 22 (1968); S. Rep. No. 91-630 at 25. As such, district courts would necessarily have to make an independent determination of true market value where necessary to provide effective relief under Section 306: to take the states' determination as conclusive would be self-defeating.

property as relevant to Section 306 overvaluation claims. Any contention to the contrary is simply unsupportable given the inclusive and specific statutory language used and the broad legislative purpose of Section 306 "to eliminate . . . discriminatory state and local taxation." [8]

D. *The "Discriminatory Intent" Test Applied By The Court Below Provides A Ready Means By Which State Tax Authorities May Negate The Federal Remedies Provided By Section 306*

Not only is the "discriminatory intent" requirement imposed by the court below contrary to the language and purpose of Section 306, it also provides an easy means by which state authorities may negate the federal remedies against state tax discrimination provided by Section 306.

As is apparent, state tax authorities, by systematic valuation of railroad property in excess of true market value, may achieve discriminatory results *identical* in scope to that obtainable through other forms of discrimination proscribed by Section 306 (e.g., application of a higher tax rate to railroad property or systematic undervaluation of nonrailroad property). Yet, under the *Lennen* rationale, such discriminatory overvaluation, unlike other forms of discrimination, would not provide a basis for a claim under Section 306 unless the railroads could, by a "strong prima facie case", demonstrate "discriminatory intent" as well as discriminatory impact.

As exemplified by the District Court decision below, the "discriminatory intent" requirement requires the railroads to challenge and rebut not only the correctness, but also the "good faith" of the valuation methodologies and procedures used by state tax authorities. Pet. App. at 9a, 16a. Such a jurisdictional requirement, which permits state authorities ample opportunity to devise "good faith" valuation methodologies that in fact systematically discriminate against railroad property, provides a ready loophole through which state tax authorities may channel discriminatory tax efforts free from federal interference. Indeed, in the instant case the District Court, in denying relief under Section 306, found that "there is some indication that the Plaintiffs' property has in fact been overvalued." Pet. App. at 16a.

As Congress noted in the course of enacting Section 306, "interstate carriers, especially railroads, are easy prey" for state discriminatory tax practices. S. Rep. No. 92-1085, at 4; see also S. Rep. No. 91-630, at 3.

> They are non-voting, often non-resident targets for local taxation, and cannot remove their rights-of-way and terminals even if the burden of tax discrimination becomes heavy. Their statutory obligation as regulated common carriers further roots them to their location since they are obliged to provide service to the locality. Railroads are particularly subject to discriminatory taxation since they have the largest investment in fixed plant . . .

S. Rep. No. 92-1085, at 4.

Indeed, for the year 1981 (the last year for which such figures are publicly available), the assessed value of railroad assets subject to state ad valorem taxes in all state jurisdictions totalled $6,624,000,000. *1982 Census of Governments*, U.S. Department of Commerce, Bureau of the Census, at Table 2, p.3. For states within the Tenth Circuit, the 1981 assessed value of such railroad property totalled $558,000,000. *Id.* These figures do not include the assessed value of locally assessed railroad property. Moreover, the potential revenues available to

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[8] The only specific limitation established by Congress with respect to the jurisdiction of federal courts to enjoin discrimination claims is set forth in Section 306(2)(c). That provision provides that "no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction."

states through ad valorem property taxes on railroads are enormous. In 1985, based on aggregate Class I railroad figures set forth in Annual Reports (R-1) filed with the Interstate Commerce Commission, total ad valorem taxes assessed in 1985 for all Class I railroads in all state jurisdictions totalled $232,294,000. Thus, the incentive for state tax discrimination is as great today as it was in 1976 when Congress first enacted Section 306.

As the legislative history makes clear, Congress specifically enacted Section 306 because it found that the states, if left to their own devices, would not take effective action against discrimination against railroad property. See, e.g., S. Rep. No. 91-630, at 7-8; S. Rep. No. 92-1085, at 4. The *Lennen* decision, by imposition of the restrictive "discriminatory intent" requirement for discriminatory overvaluation claims, brings the legislative process around full circle by providing the states a ready means of imposing discriminatory taxes while totally avoiding federal injunctive remedies under Section 306.

II. The Decision Below Conflicts With Those Of Other Circuits

Contrary to the *Lennen* decision relied upon by the court below, which found "it . . . by no means clear that § 306 was intended to provide relief from every form of de facto discrimination" (715 F.2d at 497), every other circuit that has considered the issue has concluded that the purpose of Section 306 was "to prevent tax discrimination against railroads in any form whatsoever" and in "all of its guises." *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981), *cert. denied*, 454 U.S. 1086 (1981); *Trailer Train Co. v. Bair*, 765 F.2d 744, 745 (8th Cir. 1985); *Richmond, Fredericksburg v. Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985); *Alabama Great Southern Railroad Co. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981); *Southern Railway Company v. State Board of Equalization*, 715

F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). Indeed, consistent with the scope and purpose of Section 306 recent decisions of both the Eighth and Ninth Circuits have *specifically rejected* the "discriminatory intent" test fashioned by the *Lennen* court as a jurisdictional bar to a Section 306 claim based upon discriminatory overvaluation.

In *Burlington Northern R. Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985), the Eighth Circuit considered a Section 306 tax discrimination claim by BN alleging that the state had engaged in unlawful tax discrimination through tax assessments which valued BN's property in excess of true market value while other commercial and industrial property in the state were assessed for tax purposes at lower levels. BN claimed that as a result of such state valuation practices the ratio of assessed value to true market value of BN's property exceeded the ratio of assessed value to true market value of all other commercial and industrial property in the state by at least five percent contrary to the non-discrimination requirements of Section 306. *Id.* at 1225. State tax authorities, in response to BN's tax discrimination claim, asserted in defense that Section 306 did not confer jurisdiction on the federal courts to review state valuations of *either* railroad or other commercial property to determine if assessed value/true market value ratios were in fact "equalized" between railroad property and other commercial and industrial property in the state. *Id.*

The Eighth Circuit, finding that review of state valuation determinations in the context of ratio discrimination claims brought under Section 306 (which the court broadly characterized as requests for "equalization" relief under Section 306) were *essential* if the nondiscrimination requirements of Section 306 were to be properly implemented, squarely rejected the state's position. *Id.* at 1225-1226. In so doing the Eighth Circuit also squarely rejected the "intentional discrimination" test imposed by

the *Lennen* court as a jurisdictional prerequisite to a Section 306 claim based upon discrimination overvaluation of railroad property. As held by the Eighth Circuit in *Bair*:

> [I]f we were to accept the [state's] position, section 306 would be a mere shadow of the relief from discriminatory taxation which Congress intended. *See* S. Conf.Rep. No. 595, 94th Cong. 2d Sess. 136, 165-66, *reprinted in* 1976 U.S. Code Cong. & Ad. News 148, 151, 180-81. Unless the district court makes its own findings regarding valuation, states would be free to discriminate against railroads by assessing a value far in excess of the true market value, while assessing all other property at true market value, and then asserting, as Iowa does, that assessed value is always equal to true value. Regardless of whether it occurs purposefully or by honest error, section 306(1)(a) forbids this type of discrimination.
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> In order to make the comparison for equalization purposes under section 306(1)(a), the district court must make findings of fact on: (1) the assessed value of plaintiff's property; (2) the true market value of plaintiff's property; (3) "the assessed value of all other commercial and industrial property in the same assessment jurisdiction"; and (4) "the true market value of all such other commercial and industrial property." The district court must calculate the two ratios and determine whether they vary by at least five percent. § 306(2)(c). . . . Because there is no intent element in Section 306, Burlington Northern need only prove the accurate values, not purposeful undervaluation or overvaluation.

766 F.2d at 1225-1226.[9]

[9] In its decision below, the Tenth Circuit specifically noted that "there is language in [*Bair*] that may be read as inconsistent with our intentional discrimination ruling in *Lennen*" Pet. App. at 3a. The court below, however, in an effort to negate the clear conflict in the circuits, characterized the inconsistent *Bair* language as "dicta" and noted that the *Bair* decision had also specifically distinguished the *Lennen* case. Pet. App. at 3a.

The decision below is also in direct conflict with a recent Ninth Court decision in *Atchison, Topeka and Santa Fe Railway v. Board of Equalization*, 795 F.2d 1442 (9th Cir. 1986) ("*Santa Fe*"). In the *Santa Fe* case, the railroad petitioners brought a tax discrimination suit under section 306 claiming that the "true market value calculated by state tax authorities was higher than the real true market value and therefore they paid higher taxes proportionately than other commercial and industrial property owners." *Id.* at 1445. The railroads further claimed that Section 306 "provided a remedy for discrimination that results from overvaluation of rail transportation property, caused by generally not applying the methodology correctly or by negligently or intentionally inflating figures." *Id.* The Ninth Circuit, in categorically upholding the railroads' discriminatory overvaluation claim under Section 306, held as follows:

The effort of the court below to reconcile the *Lennen* and *Bair* decisions, however, is patently unpersuasive. First, the *Bair* court specifically remanded the case to the district court to correct its error "in failing to make findings of fact on assessment values and true market values." 766 F.2d at 1226-1227. Far from constituting *dicta*, therefore, the language cited in *Bair* regarding the need for true market value findings in Section 306 cases based on claims of discriminatory overvaluation of railroad property is in fact the *direct holding* of that case. Second, although the *Bair* case refers to the *Lennen* case as "dealing with overvaluation claims rather than the equalization claim at issue in the present case [766 F.2d at 1225]," the distinction is wholly semantical. Both cases in fact involved requests for "equalization" relief based upon discriminatory overvaluation of railroad property in relation to other commercial and industrial property in the state. Moreover, the *Bair* court (in remanding the case for valuation determinations) resolved the issue in a manner directly in conflict with the *Lennen* court (which interposed the "intentional discrimination" test as a jurisdictional bar and affirmed the district court's dismissal of BN's request for injunctive relief).

> We conclude that the district court erred in holding that the railroads' valuation challenge was outside the scope of the 4-R Act. The 4-R Act gives federal district courts the power to enjoin certain discriminatory state taxation practices, 49 U.S.C. § 11503(c). Section 11503 specifically refers to the "true market value" of rail property and identifies that factor as an integral element of the statutory test for discriminatory taxation. The normal presumption is that true market value—like all factual issues bearing on a claimed statutory violation—would be open to dispute and proof before a federal court hearing a 4-R Act claim. Therefore, the statute confers federal jurisdiction to hear challenges to the state's calculation of the railroad property's true market value.

Id. at 1445.

The Ninth Circuit also specifically addressed and rejected the "intentional discrimination" jurisdictional test adopted by the *Lennen* court:

> The purposes of the 4-R Act . . . support the power of the district court to hear the valuation claim involved here. Congress enacted the statute to end what it perceived to be the pervasive and longstanding practice of discriminatory taxation of railroads. Given the important remedial objective of the legislation, it is implausible to assert that the Act was not intended to provide relief from every form of de facto discrimination. Such a holding would frustrate the purposes of the statute and lead to irrational consequences.
>
> Indeed, the only circuit to consider a claim of overvaluation recognized that such claims were cognizable under the Act, albeit only if a certain threshold showing was made. *See Burlington Northern R. Co. v. Lennen*, 715 F.2d 494, 498 (10th Cir. 1983) (holding that railroad could prevail on an overvaluation claim in federal courts provided it "can make a strong showing of a purposeful overvaluation of a particular railroad's property with discriminatory intent"), *cert. denied*, 104 S.Ct 2690 (1984). We decline to adopt the Tenth Circuit's threshold requirement; however, we agree that federal courts have jurisdiction over claims of rail property overvaluation.[10]

Id. at 1446; see also *Louisville & Nashville R. Co. v. Dept. of Rev. Etc.*, 736 F.2d 1495, 1498 (11th Cir. 1984) (noting generally that "[d]iscriminatory intent is not a precondition to recovery [under Section 306] once disparate impact is shown"); *Southern Ry. Co. v. State Board of Equalization*, 715 F.2d 522, 527 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984) ("Congress meant unconditionally to ensure a federal forum for Section [306] claims," including cases "alleging de facto discrimination as well as de jure.")

Based upon the statutory language, legislative history and inclusive remedial purpose of Section 306, this Court should reverse the decision below as contrary to the requirements of Section 306 and as inherently disruptive of the federal statutory scheme. Moreover, because the decision below is in direct conflict with those of other circuits, reversal by this Court is necessary to ensure the uniform and proper administration of Section 306 by the federal judiciary and to provide railroads operating within the Tenth Circuit an effective federal remedy against state tax discrimination as Congress intended.

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[10] The panel majority in the *Santa Fe* case, however, found that the district court should abstain from determining the merits of the valuation issue until the conclusion of pending state valuation cases. *Id.* at 1448. The court reasoned that although "Congress intended the 4-R Act to provide a federal remedy for discriminatory state taxation of railroad property," the railroads "cannot be heard to complain if a federal court defers to a state court in which the railroads themselves first sought relief." *Id.* A petition for rehearing on the abstention issue in *Santa Fe* was filed August 14, 1986; responsive briefs have been filed and the petition is currently awaiting decision by the court.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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